

YOLANDA HEBERT
Claimant

MR. GOODCENTS SUBS & PASTAS
Respondent

ALLIED MUTUAL INSURANCE GROUP
Insurance Carrier

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ORDER

All parties appeal the May 25, 1999, Award of Administrative Law Judge Bryce D. Benedict. The Administrative Law Judge found claimant's accidental injury arose out of and in the course of her employment with respondent and awarded claimant a 100 percent permanent partial disability through December 31, 1998, and a 25 percent whole body disability after January 1, 1999. Claimant objects to the award, arguing that she is permanently and totally disabled from any type of employment as a result of the injury suffered on September 14, 1997. Respondent objects to the award, contending claimant failed to prove that she suffered accidental injury arising out of and in the course of her employment. Oral argument was held on October 13, 1999.

APPEARANCES

Claimant appeared by her attorney, Terry J. Torline of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Jeffery R. Brewer of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are utilized by the Board for the purposes of this award.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of her employment on the date alleged?
- (2) What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a part-time employee at respondent's sandwich shop, alleges that she cut her thumb on a slicing machine on September 14, 1997. As a result of that cut, claimant alleges she developed an infection which rapidly progressed into a necrotizing fasciitis involving her arm and chest wall. Claimant was hospitalized, the condition successfully treated, and claimant was released on October 16, 1997. One week later, claimant reentered the hospital with a 104 degree temperature, when her preexisting discoid lupus flared up. Claimant alleges that the flare-up of her lupus is attributable to the infection, that her health has been permanently impaired and she has a 100 percent permanent partial disability and is permanently and totally disabled from any type of employment as a result of her injuries and resulting infections.

Respondent contends claimant is not a credible witness, as the description of her thumb cut varied substantially between the preliminary hearing and the regular hearing. At the preliminary hearing, claimant testified that the cut on her thumb, while visible, was not painful and was so minor that it did not require bandaging. Claimant testified she completed her duties on that day and went home. At the regular hearing, claimant testified that the cut was very painful and that she had to put a band-aid on it.

Respondent presented several witnesses who testified that claimant failed to report or in any way make them aware that she had cut her thumb at work on September 14, 1997. Only one witness, Andre' Quinton, formerly an assistant manager of respondent, indicated he was aware that claimant had ever been at work with any type of an injury. On one occasion, he noticed claimant wearing a bandage. She indicated she had a cut on a finger but made no mention as to how the cut occurred. Respondent's other witnesses, including Eric Smith, the general manager, and Sara Tadtman, the crew trainer, testified that they were never advised that claimant had suffered any type of cut while employed with respondent.

At the regular hearing, respondent produced the slicing machine which claimant alleges caused the cut. Respondent also produced a videotape which demonstrated how the slicer was used. While the Board did view the videotape, the slicer was not made an exhibit and, therefore, not available to the Board for its inspection. However, a close view of the videotape does provide an accurate representation of how the machine operated.

In the Award, the Administrative Law Judge found it “practically impossible for anyone’s finger or thumb to make contact with the blade from underneath.” The Administrative Law Judge went on to state that “it is highly unlikely that she could have cut her thumb as she described. However, unlikely does not equate to impossible.”

The Appeals Board, in reviewing the videotape, finds it both highly unlikely and practically impossible for anyone to make contact with the blade from underneath. In order for claimant’s thumb to have been cut, she would have had to have rotated her hand in an unusual fashion, contrary to what was shown on the videotape. The Administrative Law Judge also noted that claimant’s description of how the thumb cut occurred was made even less likely due to the fact that the persons in the videotape catching the product were bent over and looking directly at the tomato slices as they fell into their hands. The Administrative Law Judge, however, went on to find that claimant did cut her thumb as described and awarded benefits.

In workers’ compensation litigation, it is claimant’s burden to prove by a preponderance of the credible evidence her entitlement to benefits. See K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

In reviewing the claimant’s contradictory testimony, as well as the videotape of the slicer in operation, the Appeals Board finds that it would have been practically impossible for claimant to have made contact with the blade from underneath. A finding that the occurrence of an accident is “practically impossible” or “highly unlikely” does not satisfy the claimant’s burden of proof. The Appeals Board finds claimant has failed to prove that she suffered the injury as described. Therefore, claimant’s necrotizing fasciitis and preexisting discoid lupus flare-ups were not connected to her employment with respondent. The Award of the Administrative Law Judge in this matter, granting claimant benefits, is reversed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated May 25, 1999, should be, and is hereby, reversed, and the claimant, Yolanda Hebert, is denied an award against the

respondent, Mr. Goodcents Subs & Pastas, and its insurance carrier, Allied Mutual Insurance Group, for the alleged injury of September 14, 1997.

The requirement that respondent reimburse the Kansas Department of Social and Rehabilitation Services for medical expenses in the amount of \$41,300.72 is reversed, and respondent and its insurance carrier are found to have no liability in this matter.

The fees and expenses associated with the litigation of this workers' compensation matter shall be paid by the respondent and its insurance carrier as follows:

Appino & Biggs Reporting Service	\$541.60
Curtis, Schloetzer, Hedberg, Foster & Associates	\$372.60
Bannon & Associates	\$208.80
Barber & Associates	\$114.00
Nora Lyon & Associates	\$ 48.40

IT IS SO ORDERED.

Dated this ____ day of December 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Terry J. Torline, Wichita, KS
Jeffery R. Brewer, Wichita, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director